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June 26, 1997

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Office of the Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Docket No. 97-98

Dear Sir or Madam:

Enclosed for filing are the original and eleven (12) copies of the Comments of Ohio Edison Company on the Commission's March 14, 1997 Notice of Proposed Rulemaking. Four (4) of the enclosed copies are addressed directly to the Commissioners.

I have also enclosed one (1) copy of the Comments. Please time-stamp it filed and return it to me in the enclosed self-addressed, stamped envelope.

If you have any questions concerning this filing, please call me at the above number.

Sincerely,

Rick Giannantonio
Attorney

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Enclosures (13)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Matter of	)	
	)	
Amendment of Rules and Policies	)	CC Docket No. 97-98
Governing Pole Attachments	)	
	)	

COMMENTS OF OHIO EDISON COMPANY

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Dated June 26, 1997

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June 26, 1997

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SUMMARY

General Proposition

As a general proposition, Ohio Edison believes the Commission's adoption of a formula-based system is not the appropriate approach to determining pole attachment costs. Rather than use this approach, the Commission should embrace a methodology which reflects market-based rates for pole attachments which allows economics to determine appropriate costs. At the very least, Ohio Edison believes the Commission should adopt a rate methodology that incorporates forward-looking costs or replacement cost estimates in its rate formula.

Adjustments to Formula

If a formula-based approach is adopted by the Commission, certain adjustments need to be made to the formula to more closely approach a "just and reasonable" perspective. For instance, Ohio Edison agrees that relating to pole heights that a rebuttable presumption is an appropriate mechanism to account for pole height variations among utilities. However, the presumption should be 40 feet and not 35 feet which we believe more accurately reflects the true height in the industry. Regarding the 40-inch safety span required between electrical conductors and communication cables, the Commission has included such space as part of the utilities' "useable space". Ohio Edison believes it is a faulty premise to deem this "useable space". According to the stated purpose of the space as described in the National Electric Safety Code as well as the safety concerns raised by communications workers in recent pole attachment negotiating sessions, Ohio Edison believes that

this space should be considered "unusable" space or at the very least there should be an equal allocation of space between telecommunication providers and electric utilities. Concerning the 18 foot minimum clearance space considered "unusable" by the Commission between the point of attachment and the ground, many states, including Ohio, mandate a higher ground clearance requirement. To be in compliance with State code and to account for line sag, Ohio Edison believes the presumption of usable "unusable space" should not be less than 19.8 feet.

The Commission has also solicited comments on the costs of a Base Pole. Although Ohio Edison does not segregate poles investment by height, utilities which do maintain this information should have the option of excluding these costs from base pole costs. Further, Ohio Edison believes the Commission should utilize gross book costs which would help levelize the fixed charge for capital rate investment. This approach is far more straightforward than the process of backing out negative net value from the depreciated pole cost.

Under the rate formula proposed by the Commission, the Commission limits costs to FERC Account 364 (Poles, towers and fixtures) which is used to calculate pole investment cost. Ohio Edison asserts that there are, however, other FERC accounts that contain pole-related investment costs that should be included in the calculation of the cost of a base pole (the suggested allocated portions of these accounts is described in the text of the Comments, infra). For instance, FERC Account 365 (Overhead conductors and devices) should be included since this account tracks costs of devices like lighting arresters and ground installations which serve to protect the pole and all of its attachments. In addition, FERC Accounts 367 (Underground conductors and devices), 368 (Line

transformers), and 369 (Services) tracks costs of equipment which is part of the overall grounding protection. This equipment is part of the multi-ground neutral system which protects the entire pole. Other FERC accounts, 397 (Communication equipment) and 360 (Land and land rights) should also be included.

The Commission's carrying charge rate is comprised of the sum of individual components for administrative expenses, maintenance expenses, depreciation expenses, taxes and return on invested capital. The Commission has solicited comments on maintenance expenses and return on invested capital. The maintenance expense component of the carrying charge currently only includes FERC Account 593 ("Maintenance of overhead lines (major only)). Ohio Edison believes allocatable portions of FERC Account 590 (Maintenance and supervision and engineering (major only)), 594.1 (Engineering Maintenance) of lines (Non-major only)), FERC Account 595 (Maintenance of line transformers) and any other relevant costs not identified in these accounts should also be included in this category. Further, the carrying charge should include a component to capture operational costs of the pole distribution system. Portions of the following accounts should be included in this component: FERC Account 580 (Operation supervision and engineering), FERC Account 583 (Overhead line expenses (major only)), FERC Account 588 (Miscellaneous distribution expenses). Finally, the Commission utilizes the current rate of return authorized by state authorities. We believe the appropriate rate of return should be based upon the end of the year capital structure of a utility which is a weighted average of average debt interest, average preferred stock return, plus a return for the utilities' common stock.

Major Considerations for Electric Conduit Methodology

The Commission proposes the same rate-making approach for electric conduit that it uses for pole attachments which recognize the "inherent differences in safety aspects" between cables and conduits. The characteristics that should influence any rate methodology adopted by the Commission include the following: (1) electric conduit systems are large undertaking involving excavations and underground systems which are closely controlled by local ordinances and permits; (2) many conduit systems were constructed years ago and there is a large disparity between book value of the conduit and its replacement value, thus generally undervaluing historical costs; (3) electric conduit system costs vary greatly between and urban and rural environment; (4) empty ducts are installed for future expected expansion as a necessary reserve to supply reliable energy; (5) electric and communication cables cannot share the same conduit duct; (6) NESC has specified guidelines on separations that recognize the physical differences between electric supply and communication cables; (7) safety concerns should be paramount because communication workers are not normally trained and outfitted for high voltage work; and (8) the general practice of electric utilities and telephone providers is that conduit duct banks are not jointly shared.

Appropriate Rate Methodology for Electric Conduit

Historical traditional ratemaking or recovery of historical costs is inappropriate for developing rates for access to electric conduit. This type of approach would result in a valuable resource sold for below its market value. A more realistic ratemaking approach should place primary emphasis on market-based rates negotiated by the parties. The Commission should adopt general

rules containing broad parameters for determining just and reasonable rates for conduit access. Any methodology established by the Commission should place primary reliance on forward-looking costs or replacement costs as suggested in the pole attachment methodology.

Ohio Edison Company
June 26, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Matter of	)	
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Governing Pole Attachments	)	
	)	

COMMENTS OF OHIO EDISON COMPANY

Ohio Edison Company ("Utility"), pursuant to Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1994) and the Commission's Notice of Proposed Rulemaking (the "NPRM") in the above-captioned docket released March 14, 1997, hereby submits its Comments.

The NPRM seeks comment on proposed changes to the Commission's rules relating to the maximum just and reasonable rates utilities may charge for attachments made to a pole, duct, conduit or right of way under Section 224(d) of the Communications Act of 1934 (the "1934 Act") as amended by the Telecommunications Act of 1996 (the "1996 Act") (referred to together as "the Act"). Pursuant to Section 224(d)(3), the Commission's proposed rate formulations would apply to telecommunication carriers, as well as to cable companies, pending the promulgation of the new rate formula for telecommunications carriers required under Section 224(e) of the Act. Ohio Edison's comments are directed towards the proposed rate formulations as they would apply to electric utilities that own poles, conduits and right-of-ways.

Ohio Edison Company
June 26, 1997

I. INTRODUCTION

Ohio Edison Company is an electric utility engaged in the production, transmission, distribution, and sale of electric energy. Its service territory is approximately 9,000 square miles serving a population of 2,870,000 in Central/Northeastern Ohio. In addition to serving more than 957,949 retail customers, the company sells electricity at wholesale to other utilities. In addition, Ohio Edison generates and distributes 7.0 billion kWhs of external sales. Ohio Edison owns 535,305 distribution poles, 5,300 miles of underground cable and controlling numerous ducts, conduits, and rights-of-way, all of which are part of its core infrastructure by which it provides electric service. Ohio Edison accordingly has a vital interest in the outcome of this proceeding.

In the NPRM, the Commission states that a re-evaluation of the formula for the maximum just and reasonable rates that utilities may charge for attachments made to electric poles "may be necessary to improve accuracy in the continued application" of the rule to cable television systems and to telecommunications carriers under the 1996 Act. NPRM ¶ 1. The Commission also proposes in the NPRM a conduit methodology to determine "the maximum just and reasonable rates utilities may charge cable systems and telecommunication carriers for use of their conduit systems." Id. The proposed rule is the Commission's initial attempt to develop a rate methodology for electric conduit.[1/]

Part II of these Comments highlights considerations that Ohio Edison believes are important for the Commission to consider in its re-evaluation of its current rate formula for attachments to

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[1/] The Commission has a rate formulation for telephone conduit. However, as the Commission has recognized in the NPRM, there are significant differences between electric conduit and telephone conduit. See NPRM ¶ 43. Those differences are discussed in Part II infra.

electric poles. Ohio Edison then addresses in Part III of these comments the Commission's proposed conduit methodology because of its serious concerns with the Commission's proposed methodology for electric conduit. Foremost is the fact that the Commission has proposed a traditional recovery of historical costs rate methodology for conduits. Such a methodology is not appropriate for conduits because electric conduit costs, such as those of Ohio Edison, are often mostly depreciated and the replacement or expansion for electric conduit systems is highly expensive. Therefore, rates based on recovery of historic costs will not come close to reflecting the true market value or replacement costs of Ohio Edison's electric conduit system.

As a general matter, Ohio Edison believes that this proposed rulemaking, although proceeding under Section 224(d), should be undertaken in view of the rulemaking that the Commission will shortly undertake for rates to be charged telecommunication carriers under Section 224(e). To the extent Commission is able to develop rules in this rulemaking in accordance with the principles and mandate of Section 224(e), it will minimize the transition for telecommunication carriers from one rate structure to another. This objective is particularly desirable for electric conduit because the Commission currently does not have any existing rate formulation for electric conduit. To the extent feasible, therefore, the Commission should develop a rate formulation for conduits that would be in accordance with the principles and mandate of Section 224(e).

Two fundamental principles are set out in Section 224(e). First, Section 224(e) requires the Commission to develop regulations to govern attachment charges for telecommunications carriers "when the parties fail to resolve a dispute over such charges." 47 U.S.C. § 224(e)(1). This language

reflects Congress' intent that voluntarily negotiated rates should be the fundamental means of setting pole attachment rates for telecommunication carriers. Congress recognized the important role of an open and competitive market in Section 224(e) and thus provided that a government-imposed rate should come into play only as a fall-back. Therefore, Commission regulations under Section 224(e)(1) would need to be structured to allow "good faith" negotiations aimed at reaching a pro-competitive agreement to be the prevailing means of determining a rate for access by telecommunications carriers to the infrastructure owned by utilities. Prescriptive artificial, regulated rates should be avoided in keeping with this Congressional intent. In this regard, Section 224(e)(1) does not mandate the application of a historic cost recovery or any other particular rate methodology. It simply provides that rates be "just, reasonable, and nondiscriminatory."

Second, Section 224(e) recognizes that other entities attaching or utilizing electric poles or conduits should pay for part of the costs of the unusable space of the pole or the conduit. Section 224(e)(2) provides that two-thirds of the costs of "other than the usable space" of a "pole, duct, conduit, or right-of-way" is to be apportioned equally "among all attaching entities." This provision simply recognizes the obvious fact that attaching entities benefit, for example, from the entire pole -- the part of the pole buried in the ground and the height of the pole necessary to be achieve minimum ground clearance -- and not just the several feet of pole occupied by their attachments.

II. PROPOSED POLE ATTACHMENT RATES

The Commission has adopted a formula-based historic cost recovery methodology to determine the maximum allowable rate for pole attachments under Section 224(d) of the Act as follows:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}$$

NPRM ¶ 8. In the NPRM, the Commission has requested comments on potential adjustments to the various factors in this formula.

At the outset, Ohio Edison believes that the Commission's formula-based approach is inappropriate and inaccurate. Ohio Edison strongly suggests the Commission should allow market-based rates for pole attachments or, at a minimum, adopt a rate methodology that uses forward-looking costs or replacement cost estimates. Ohio Edison already has a cost-sharing agreement for pole attachments negotiated with the local exchange telephone companies which reflects market-based rates in Ohio Edison's service area. The Commission's rate methodology should allow Ohio Edison to negotiate similar market-based rates with other telecommunication providers.

In the context of disfavoring the Commission's formula-based rate approach, Ohio Edison addresses below the necessary adjustments to the various factors of the Commission's rate formula that would result in a rate that more approached a "just and reasonable" standard.

A. The First Factor -- (Space Occupied By Attachment/Total Usable Space)

The Commission in previous rulemakings applicable only to cable television companies found that the most commonly used poles are 35 and 40 feet high with usable spaces of 11 and 16 feet, respectively. The Commission determined that 24 feet of a pole (whether 35 or 40 feet in height) is unusable because 6 feet is used to set the pole in the ground and 18 feet is necessary for ground clearance. To avoid a pole-by-pole calculation of usable space, the Commission established a rebuttable presumption that the total usable space on a pole was the arithmetic averages of 11 feet and 16 feet, or 13.5 feet.

Ohio Edison strongly supports the continued use of rebuttable presumptions for pole height and of usable space. Ohio Edison and perhaps many other companies do not have computerized pole data bases that would easily allow it to identify the heights of the specific poles on which attachments are being placed. Clearly, the calculation for pole attachment rates would quickly become burdensome and unwieldy unless a rebuttable presumption based on averages is adopted by the Commission.

However, average pole heights have changed over time and Ohio Edison believes that changes in the presumptive pole height and adjustments to the Commission's presumptive determinations of usable and unusable space should be made at this time in order to avoid inequitable results and bring the pole attachment rates in accord with Section 224(e) principles to the extent possible. Specifically, Ohio Edison believes that the following changes should be made to the Commission's presumption of average pole height and usable pole space: (1) the rebuttable

presumption of average pole height should be increased from 37.5 feet to 40 feet; (2) the 40-inch safety span required by the National Electrical Safety Code between electrical supply conductors and communication cables should not be treated as electric utility "usable space" because its function is to protect communications workers and the space is not usable for attaching electric supply cables; and (3) the presumptive allocation of pole space for minimum ground clearance should include and account for sag in wires, which as a practical matter directly affects usable space on the pole. Each is discussed below.

1. Average Pole Height

The Commission seeks comment on a white paper filed by several electrical utilities which states that over time the average height of poles to which attachments are made has increased and that the Commission should adopt as a rebuttable presumption an average pole height of 40 feet. NPRM ¶¶ 17-18. Ohio Edison agrees that the average pole height has increased over time and that 40 feet is an appropriate average to use as a rebuttable presumption. In our system, the 40-foot pole represents the largest percentage of Ohio Edison's distribution poles.

2. NESC Safety Space

The National Electric Safety Code ("NESC") requires generally a 40-inch space between electrical supply conductors and communication cables attached to a pole. The Commission seeks comment on how the 40-inch safety space required by the NESC should be treated for purposes of formulating the rate for pole attachments. The Commission does so, however, "on the premise that the safety space emanates from a utility's requirement to comply with the NESC and should

properly be assigned to the utility as part of its usable space," as currently provided for by the Commission rules. NPRM ¶ 19.

Ohio Edison believes that the Commission's premise of this issue is incorrect. The NESC applies equally to both electrical utilities and communication utilities with pole attachments. The application of the code to both is clearly set out in its introductory provisions. Section 010 of the Code, entitled "Purpose," states in part as follows:

> The purpose of these rules is the practical safeguarding of persons during the installation, operation, or maintenance of electric supply and communication lines and associated equipment.

(Emphasis added.) Section 011 of the Code, entitled "Scope," states in part as follows:

> These rules cover supply and communication lines, equipment and associated work practices employed by a public or private electric supply, communications, railway, or similar utility in the exercise of its function as a utility.

(Emphasis added.) Section 012, entitled "General Rules," states in part as follows:

> A. All electric supply and communication lines and equipment shall be designed, constructed, operated, and maintained to meet the requirements of these rules.
>
> B. The utilities, authorized contractors, or other entities, as applicable, performing design, construction, operation, or maintenance tasks for electric supply or communication lines or equipment covered by this code shall be responsible for meeting applicable requirements.

(Emphasis added.) Further, the Code defines a utility to be:

> An organization responsible for the installation, operation, or maintenance of electric supply or communications systems.

Section 2 ("Definition of Special Terms") (emphasis added).

Thus, the Code's requirements apply equally to electric and communication utilities. Contrary to the Commission's working premise, it extends to organizations responsible for the "installation, operation or maintenance" of communication systems. Moreover, not only are communication utilities obligated to comply with the Code, but the purpose of the 40-inch safety span -- as recognized by the Commission -- is to protect communication employees that are "working on cable television or telecommunications attachments" from possibly contacting "potentially lethal electric power lines." NPRM ¶ 19.[2/] In negotiated pole attachment agreements, telephone companies have told Ohio Edison that safety is a primary concern for them and their union representation in this space. Communication workers are not trained or equipped to work with potentially lethal electric power lines. Therefore, the Code appropriately requires the separation of electrical supply and communication lines for their protection.

[2/] The NESC Handbook similarly observes:

> For their safety, it is intended that communications workers will not work on communication conductors, cables, or brackets located less than 1 m (40 in) below supply conductors, cables, or brackets.

National Electrical Safety Code Handbook, Fourth Edition, Allen L. Clapp, Editor, at 308 (1997) (emphasis added).

Accordingly, Ohio Edison submits that assignment of the 40-inch safety space to an electric utility's usable space is unsupported by the facts and wrong as a matter of policy and law. The Code applies equally to communication companies and moreover the origin of the 40-inch safety space is to ensure the protection of communication workers. Absent communication company workers, the Code would not require a 40-inch safety span, which essentially is unusable space on the pole. Therefore, the unusable space should logically be assigned to communication companies that have equipment attached to the electric utility company's pole or alternatively as either unusable pole space or common usable pole space.

In its initial rulemaking under Section 224(d) conducted 1978 to 1980 -- applicable at the time only to cable television companies -- the Commission concluded that the 40-inch safety span should be assigned to electric utilities.[3/] As already discussed, Ohio Edison believes that the Commission's premise of this issue was incorrect. Further, the specific reasons given by the Commission at that time (1) are no longer applicable given the subsequent 1996 Act and (2) are based on a faulty understanding of the severely limited use made of the safety space by some electric utilities.

The Commission gave three reasons for treating the 40-inch safety space as part of an electric utility's useable space. See Second Report and Order at 69-71. First, the Commission interpreted the 1978 legislative history of Section 224(d) as reflecting Congress' intent that cable companies

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[3/] See Adoption of Rules for the Regulation of Cable Television Pole Attachments, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59 (1979) (hereinafter "Second Report and Order"); Adoption of Rules for the Regulation of Cable Television Pole Attachments, Memorandum Opinion and Order, 77 FCC 2d 187 (1980) (hereinafter "Opinion and Order on Reconsideration").

would be assigned only one foot of usable pole space. Therefore, the Commission believed that it was precluded from assigning more than one foot of useable space to cable companies. Id. at 70. This rationale does not, however, apply to telecommunication carriers, authorized under the 1996 Act to make pole attachments. No legislative history dictates or suggests the amount of usable space to be allocated to telecommunication carriers. Therefore, the Commission's first rationale relied upon in its initial rulemaking under Section 224(d) does not preclude assigning all or part of the 40-inch safety span to such carriers that make attachments to an electric utility's pole.

Second, the Commission noted that under typical contracts in place at the time, the cable television operators were "responsible for all pole replacement costs necessitated by subsequent installation of additional electric or telephone lines that reduce[d] available safety space to less than 40 inches." Id. at 71. The Commission accordingly believed that, because the risk of maintaining the safety space fell on the cable companies, it would be unfair to assign the 40-inch safety zone to them as well. However, under the Commission's rules implementing the 1996 Act, this risk no longer falls on a cable television company or telecommunication carrier that attaches equipment to electric utility poles. Rather, the costs of increasing the height of a pole is to borne by those parties who directly benefit from the modification either by virtue of adding new attachments or modifying existing attachments.[4/] The Commission's rules as modified clearly state:

> [A] party with a pre-existing attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment

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[4/] See May 22, 1997 Memorandum and Order, FCC 97-173.

> if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment by another party.

47 C.F.R. § 1.1416. Thus, cable television companies or telecommunication carriers with pre-existing attachments (other than those in reserve space) that do not benefit from an increase in pole height are not responsible for costs associated with increasing the pole's height. Therefore, the second rationale relied upon by the Commission in its initial rulemaking under Section 224(d) to assign the 40-inch safety zone to the electric utility is no longer applicable.

Third, the Commission concluded that, because some utilities used the 40-inch safety space for the mounting of street lights, step-down distribution transformers and grounded, shielded power conductors, the space was of benefit to electrical utilities and should be assigned to them as part of their usable space. Second Report and Order at 71. Further, in ruling on arguments made on reconsideration that the 40-inch "safety space is not used as a matter of common practice," the Commission held that "[t]he issue is not whether the space is actually *used*, but whether it is *usable*" space under the definition in Section 224(d)(2). Order and Opinion on Reconsideration at 190-91, (emphasis in original). Section 224(d)(2) provides as follows:

> As used in this subsection, the term 'usable space' means the space above the minimum grade level which can be used for the attachment of wires, cables and associated equipment.

The Commission reasoned that "street light brackets, transformers, and the like are 'associated equipment' within the meaning of this provision" and therefore refused to alter its initial ruling that

the 40-inch safety span should be assigned to electric utilities as part of their usable space. Id. at 191.

Ohio Edison believes that the Commission's rationale for concluding that the 40-inch safety space is electric utility usable space is wrong. Not only does it ignore the origin and purpose of the safety zone, discussed above, but it incorrectly portrays the limited use of the 40-inch safety zone by electric utilities in several respects. First, the Code is clear that no current carrying supply conductors can be located closer than 40-inches to communications conductors and supply equipment. NESC § 238A and B and Table 238-1. The Code makes a limited exception only for non-current carrying equipment, such as grounded conductors, where the "equipment are effectively grounded consistently throughout well-defined areas." NESC, Table 238-1, footnote 1 (emphasis added); see also NESC Handbook at 308.[5/] Even then, the Code allows the distance between such effectively grounded non-current carrying equipment and communication conductors and equipment to be reduced to only 30 inches. Id. No electrical equipment (other than street lights which the Code

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[5/] NESC Handbook states:

> [C]ommunications workers cannot be expected to determine by inspection whether supply equipment is grounded. It is expected that areas where grounding of supply equipment is practiced will be *well defined* and *made known* if the lesser clearances permitted by Footnote 1 are to be employed.

NESC Handbook at 308 (emphasis in original).

recognizes as an entirely separate category of equipment for separation purposes) can be located closer than 30 inches to communications conductors and supply equipment.[6/]

Thus, no current carrying supply conductors can be located within the 40-inch safety zone. Within the top 10-inches of the safety zone an electric utility may locate limited, non-current carrying equipment provided that it is effectively grounded consistently throughout a well-defined area. The type of equipment placed there by Ohio Edison includes fiber optic cable that is dielectric supported by a dielectric messenger. These attachments do not interfere with the safety of the communication worker due to their dielectric properties.

This equipment is no different than the type of ancillary equipment that telephone companies typically maintain in unusable space located below their communication conductors. Telephone companies are typically assigned the lower part of the usable space on a pole. They often place related equipment, such as power supplies, below their communication conductors on unusable space below the minimum grade level. Telephone companies typically attach risers, terminals, and assorted control devices in the usable space below their normal attachment space. Therefore, the location of

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[6/] Street lights (referred to as "luminaries" in the Code) are recognized as a special category of Luminaries must be located a certain height to provide efficient lighting. The Code therefore prescribes special safety rules for street lights which, if implemented, allows them to be located close to communication conductors and equipment in the event local ordinance requires their location within the 40-inch safety zone. See NESC §§ 238C and D; NESC Handbook at 309 ("This rule is intended to recognize that some communities require certain luminare heights that would ordinarily violate the communication space requirements."). Therefore, the location of street lights within the safety zone is irrelevant in terms of whether the safety zone constitutes useable space.

such non-current carrying equipment by Ohio Edison and other utilities within the top 10 inches of the safety zone should not result in that space being declared usable electric utility space.

In its Order and Opinion on Reconsideration, the Commission made reference to the definition of usable space in Section 224(d)(2) as requiring assignment of the 40-inch safety zone to electric utilities, whether used or not used, because it was usable. However, as discussed above, the bottom 30 inches of the safety zone is not useable for supply conductors or associated equipment. Therefore, the bottom 30 inches certainly should not be considered usable electric utility space even under the Commission's rationale in its Order and Opinion on Reconsideration. Although the top 10 inches is arguably usable space under that rationale, as noted the type of equipment utilities may maintain there is no different than the type of equipment telephone companies maintain in unusable space below their communication conductors, and therefore should be treated the same.

Further, Ohio Edison submits that the Commission should consider this issue in light of the future rulemaking for rates to be charged under Section 224(e). The definition of usable space in Section 224(d)(2) is limited to subsection 224(d) and is not applicable to Section 224(e).

Ohio Edison currently has a negotiated LEC Pole Attachment Agreement that denies the right of attachment to either party in the 40-inch safety space. As previously stated, this arrangement was requested by the LEC to satisfy safety concerns raised by its labor unions. Section 224(e) encourages establishment of rates by negotiations of the parties. The Commission should only set rates where issues cannot be resolved by negotiations between the parties. In its service area, the practice of Ohio Edison and telephone companies has been in effect to share the cost of the 40-inch safety zone,

analogous to how Section 224(e) provides for the sharing of the costs of unusable space. In all "modern" pole attachment agreements entered into by Ohio Edison, the 40-inch safety zone has been identified as nonusable and telephone companies share the cost of this space. Therefore, in deference to these agreements freely negotiated between the parties, the Commission should treat the 40-inch safety zone as unusable space or common usable space allocable among the communication carriers and the electric utility.

In sum, the 40-inch safety zone is unusable space on the pole and should be treated by the Commission as such. Neither electric power supply nor communication "wires or cables" can be attached in this 40-inch safety span. To the extent the Commission deems compelled to treat part or all of this space as usable space under Section 224(d) by virtue of the definition in Section 224(d)(3), this usable space should be allocated equally as common usable space among telecommunication carriers and the electric utility with attachments on the pole. Although the Commission's present position requires the pole owner to pay 2/3 the safety zone space cost, Ohio Edison suggests, based on its operating practice, that the safety zone costs should be split three (3) ways i.e., 1/3 power, 1/3 telephone and 1/3 telecommunications.

3. Decrease In Usable Space To Account For Sag

In its initial rulemaking under Section 224(d), the Commission concluded that 18 feet was the minimum clearance required between the cables at their point of attachment on the pole and the ground and was therefore unusable space. Second Report and Order at 68-69. The minimum ground clearance for utility cables or wires is specified by the NESC and state statutes. It is typically

measured at the mid-span between the poles, where the cable will be lowest because of sag, than at the points of attachment on the poles. Therefore, the minimum height at which attachments can be made to a pole must be greater than the minimum ground clearance specified by the NESC or applicable state statute in order to account for sag. In its initial rulemaking under Section 224(d), the Commission did not address the issue of sag in setting the minimum ground clearance.

The State of Ohio (where Ohio Edison operates) generally requires a minimum ground clearance of 18 feet at the mid-span which is higher than what other states require.[7/] In order to achieve a minimum ground clearance of 18 feet, attachments on the pole should be made no lower than 19 feet 8 inches from the ground. Therefore in Ohio Edison's circumstances, 19 feet 8 inches of the pole is unusable space in order to provide for the prerequisite ground clearance required by Ohio law.

Accordingly, to account for Ohio law and many other utilities operating in states that have similar state requirements, the Commission should utilize a minimum ground clearance of 19 feet 8 inches at the pole in establishing its rebuttable presumption for average usable pole space. Together with the 6 feet of the pole underground and the 40 inch safety span, the other than usable space on a pole would be 29 feet. (Assuming the Commission increases the presumptive height of a pole to 40 feet, this would leave 11 feet of usable pole space.) Alternatively, the rules promulgated by the Commission should expressly allow a utility to use a different average of usable space for its rate

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[7/] The NESC generally requires a minimum clearance of 15 feet 6 inches between utility cables and the ground at mid-span and minimum height of 18 feet for attachments on the pole would be sufficiently high to account for sag.